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No. 682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ANGELO PASSINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

MELVIN B. LEWIS,
FRANK W. OLIVER and
MITCHELL H. CAPLAN,
30 N. LaSalle Street
Chicago, Illinois 60602
Attorneys for Petitioner

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May it please the Court:

The government has offered a casual answer to the petition of Angelo Passini. This reply is not prompted by the need to rebut the government's assertions. Rather, it is the product of our belief that a diminution of basic rights, of the magnitude here involved, should, if it is to occur at all, be the product of something more than a shrug.

Accordingly, we think it appropriate to remind your Honors what the government did *not* say in its answer to our Petition.

I.

AS TO THE DENIAL OF THE RIGHT TO COUNSEL

It is to be noted that the government does not submit one word, in response to our complaint concerning the trial court's treatment of the defendant in his counsel's absence (Cf. Petition pp. 22-27). The removal of the petitioner to a place where he was unable to hear the testimony; the threats and denigration; the statement that his bail would be revoked unless he refrained from further motions; the conflicting directions and confusing caveats directed at him—no attempt is made to justify these. They are beyond justification. It is to the government's credit, that no excuse is offered.

Rather, the government contends that Petitioner was not prejudiced because "(d)uring Mr. Lewis' absence, no evidence was introduced that implicated petitioner Passini. . . ."

But as we pointed out (Petition p. 29), evidence was offered which, properly exploited, would have helped him greatly.

And very certainly, the presence of counsel would have prevented the trial court's bludgeonings which held Petitioner up to ridicule and obloquy in the eyes of the jury.

The government complains (G. Br. 9) that Petitioner has suggested ". . . that absence of counsel *ipso facto* requires reversal." Petitioner is not required, on the state of the record here, to advance that proposition. Of course, in order to affirm, the government's statement of that issue must be answered in the negative. But Petitioner is, we believe, entitled to reversal on much more narrow grounds,

if need be: Whatever may be the minimum standard for treatment of a defendant deprived of counsel, those standards were violated here.

If it were necessary, we should not hesitate to state that a defendant's trial can never proceed in the absence of his counsel, where the defendant is without fault in the matter. We regard the language of the Sixth Amendment as unequivocal. Equally unequivocal, have been the prior expressions of this and other Courts, a few of which were cited in our Petition.

Action by this Court is required here if the law, in this area, is not to become a hopeless jumble of contradiction. We do not envy the job of the scholar faced with the task of reconciling the opinion below with this Court's decisions in *Massiah, Escobedo,* and *Miranda.* Ultimately, the rule which that scholar must derive from his comparison, is this:

> "The right to counsel, on demand, is absolute *before* trial. At trial, it is conditional."

• • •

In an attempt to justify that "rule", the government cites to your Honors, three cases from lower Courts.

None of these cases support the government's position here. One of them, *Danziger* v. *United States,* 9 Cir. 1947, 161 F.2d 299, has nothing to do with the case at bar. In *Danziger,* no trial proceedings were held in the absence of counsel; the only question involved in that case, related to a possible conflict of interest. 161 F. 2d 301.

United States v. *Dardi,* 2 Cir. 1964, 330 F. 2d 316, likewise did not involve any proceedings in the absence of counsel. In *Dardi,* one defendant retained counsel whom he

knew to be in questionable health. Prior to trial, that counsel moved for a postponement of "at least a month and a half to two months." The motion was denied, and other counsel assigned, who saw the trial through from start to finish. Original counsel was available for consultation. The issue presented, related only to the question of possible conflict of interest. The trial court stated that if a conflict arose, appropriate precautions would be taken. No conflict arose. Accordingly, no error was found. (330 F. 2d 335) Those facts are a far cry from the present case.

The government's final citation is to *United States* v. *Bentvena*, 2 Cir. 1963, 319 F. 2d 916. In *Bentvena*, the absence of counsel resulted from "manipulations" on the part of the defense. (319 F. 2d 937) It was a part of a pattern of disruption which culminated in unruliness so pronounced as to require the gagging and shackling of defendants, to preserve the security of the courtroom (319 F. 2d 930). The Court in *Bentvena* takes special note of the suspicious nature of the occasions for the absence of counsel in that case, (319 F. 2d 937), but cautions that where a defendant ". . . is able to obtain counsel for himself, he must be given a reasonable time and a fair opportunity to secure counsel of his own choosing." 319 F. 2d 936.

Bentvena is a completely unique situation, and certainly does not authorize proceeding in the absence of counsel, with no opportunity to obtain new counsel, where the defendant is without fault with respect to counsel's absence. Petitioner engaged in no "manipulations", no misconduct, no impropriety. Those very factors were deemed determinative in *Bentvena*.

II.

THE SUFFICIENCY OF THE EVIDENCE

In our Petition, we fully discussed each item of evidence against Petitioner. We pointed out that from a consideration of the government's case alone—both direct and cross examination—there was no basis for Petitioner's conviction.

The government has answered, by extracting those portions of its own evidence which tend to support the conviction, and ignoring those portions which are inconsistent with the conviction.

Obviously, the right to cross-examination is meaningless if only the direct testimony is to count in determining guilt. Equally obviously, an oath to tell "the whole truth" is an empty form, if only those portions of the "truth" which support guilt are to be considered.

When all else fails, exculpatory evidence is deemed "either a slip of the tongue or a reporter's error." (G. Br. 6, 7). Even the transcript itself, apparently, is not sufficient basis for the impeachment of a verdict of guilty.

III.

THE PRODUCTION OF GRAND JURY MINUTES

The government has answered our Petition in a document which also embraces totally unrelated claims made by other petitioners arising from the same trial.

Such, apparently, is the ritualistic course of conspiracy prosecutions at all levels.

We believe that the government's handling of this matter, entitles us to comment on the issue of the production of grand jury minutes.

The government discusses the issue in terms of this Court's holding in *Dennis* v. *United States*, 384 U.S. 855, 16 L. Ed. 2d 973. The government views *Dennis* as preserving the requirement of "particularized need" for disclosure of grand jury minutes, and argues that the defense presented no showing of such need.

We think that argument misses the point entirely. The trial court was apparently satisfied by the showing of "particularized need." Accordingly, it examined the transcript *in camera*, and found no "*material* difference" in the testimony. (Tr. 914, emphasis added.)

This was precisely the procedure disapproved in *Dennis*. (16 L. Ed. 2d 986) The trial judge undertook to act as advocate for the defense, and then determined that there was no occasion for advocacy. That is not the proper function of a judge, as *Dennis* holds.

The trial judge saw a need sufficient to require examination of the transcript. Comparing the grand jury testimony with that given at the trial, he apparently found that there were "differences", but that they were not "material." We think a defendant is entitled to insist that the "materiality" of any such difference be determined by a procedure in which his lawyer participates, and that it be presented to the jury if his lawyer thinks it worth while. That, we believe, is what *Dennis* holds.

The significance of this issue to Petitioner Passini, is that the episode reflected the same reasoning which impelled the trial court's unwarranted and erroneous assumption that there was no conflict between his defense and that of De Maro. Needing advocacy, Petitioner received only judgment.

CONCLUSION.

Petitioner's points are simply not susceptible to the airy dismissal accorded them by the government. We pray for review. We believe that we do so, in a cause which merits that prayer.

Respectfully submitted,

MELVIN B. LEWIS,
FRANK W. OLIVER and
MITCHELL H. CAPLAN
Attorneys for Petitioner.